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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

CLAIRE BREEDLOVE SMITH,

Petitioner and Appellant,

v.

MONICA SMITH,

Respondent and Respondent.

A153691

(San Francisco City and County  
Super. Ct. No. FDI-17-788841)

Claire Breedlove Smith appeals from a domestic violence restraining order imposed against her for the protection of Monica Smith and the parties' two young children. She contends the trial court erred in failing to give her an opportunity to be heard regarding one of the incidents found to constitute abuse, in granting the restraining order based on an alleged incident that was not supported by the evidence and another incident that should not be considered abuse, in admitting evidence concerning her mental health, and in finding that respondent did not commit perjury in her application for the restraining order. We affirm.

**BACKGROUND**

The parties married in June 2012. Claire gave birth to their twin daughters in February 2014. On November 30, 2017, Claire filed a petition for dissolution of marriage. On the same date, Monica emailed their landlord 30 days notice of their intent to move out of their San Francisco rental.

On December 1, 2017, while Monica was away for the weekend, Claire moved out of the family home with the children. Monica returned on Sunday to find them gone,

along with what she described as “all the contents” of the house. She tried unsuccessfully to reach Claire, then called the police. After her brother also tried to reach Claire, Monica received a text from Claire saying, “ ‘Tell Joey to call my lawyer Adam Gurley,’ and, “ ‘We moved to San Ramon.’ ”

According to Monica, prior to December 1, she and Claire had discussed moving to Alameda, either to separate apartments or to do a “nesting” arrangement with the children in the same house, but had not made any decisions. Monica had suggested the weekend away as a break, because they had not been getting along and she wanted to avoid fighting in front of the children. She was “totally shocked” that Claire had moved out.

On December 4, 2017, Claire filed a request for a domestic violence restraining order (DVRO) (DV-100) against Monica, seeking protection for herself and the then three-year-old twins. She described an incident on November 30, 2017, in which Monica blocked the doorway to the bedroom, shaking her fists inches from Claire’s face and threatening to take the children away from her, and an incident a few days earlier at Monica’s family’s cabin in which she was “forcibly separated” from her daughters and prevented from leaving by Monica’s family, and “grabbed and injured” by Monica’s sister, Molly. Claire described a history of Monica threatening, insulting and belittling her, including throwing objects in anger, having fits of rage over Claire spending money, and keeping the children away from her, and stated that she feared a physical attack was imminent.

The court issued a temporary restraining order on December 4, 2017, and gave Claire custody of the children, with no visitation pending the hearing set for December 20.

On December 8, 2017, Monica filed both a response to Claire’s request for a DVRO and her own request for a DVRO against Claire. She stated that Claire suffered from bipolar disorder characterized by “frequent, lengthy, and psychotic manic and depressive episodes” during which she is unable to care for herself or the children and becomes angry and vindictive toward Monica, and that she was presently in an “extreme

manic phase,” “stole” the twins, “wrecked” the house and was concealing their whereabouts. Monica described herself as the “only” or “primary” caretaker for the children and Claire as a largely absentee parent. She related issues including Claire being under investigation by her employer, the United States Department of State (State Department), for insurance fraud involving use of Monica’s and Molly’s names;<sup>1</sup> Claire’s compulsive shopping depleting family savings; and Claire being so heavily medicated at night that she could not hear the children crying or a smoke alarm, financially controlling Monica, abusing drugs and alcohol while caring for the twins, driving under the influence, and giving the children sleeping pills. Monica denied the allegations in Claire’s request for a DVRO. Regarding the incident at her family’s cabin, Monica stated that Claire was attempting to leave with the children for a four-hour drive back to San Francisco while heavily intoxicated and in a rage, and shoved Molly into a door while Molly was holding one of the twins.<sup>2</sup> Monica sought custody of the children, with supervised visitation for Claire, and, stating she believed there was a risk Claire would abduct the children, an order prohibiting Claire from taking the children out of San Francisco County without written permission or a court order.

The court granted Monica’s request for protective orders for Monica herself but denied the request for a DVRO with respect to the children, citing the conflicting allegations in the parties’ DVRO requests. The court required both parties to have written consent from the other in order to take the children outside San Francisco, ordered joint legal and physical custody on a “2-2-3 schedule” as detailed in the order, and amended the previously issued TRO accordingly. It also ordered that the children be re-enrolled at their San Francisco preschool.

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<sup>1</sup> Monica’s papers at one point refer to Claire having submitted \$100,000 in fake medical receipts and at another point to her having stolen \$10,000 from the State Department.

<sup>2</sup> In addition to her own declaration, Monica submitted several declarations from friends and relatives describing Claire as unstable and volatile, and Monica as the girls’ primary caretaker and stabilizing force in the family.

Over the course of the days following December 3, Monica called the San Ramon police four times to go to Claire's house for welfare checks on the children. She testified that she did not know where the children were, was scared Claire was in a manic phase and was not reassured when the police told her Claire "seems fine" and "seems like a really nice lady" because Claire "can also present herself as being very okay." Monica was aware that the police also went to the children's daycare in San Ramon but testified she did not ask them to do this. Monica went to the San Francisco police on December 9, after obtaining the restraining order prohibiting taking the children out of San Francisco, but was told there was nothing they could do.

Claire testified that she felt scared and harassed when she was contacted by the San Ramon police because she believed the TRO she had obtained on December 4 would protect her from Monica's "harassment and abuse" but Monica prevented this by telling the police the children's welfare was at risk. Because Monica continued to call the police after they had concluded on the first visit that the children were well cared for, which in Claire's view should have eliminated Monica's concern, Claire did not believe Monica was truly concerned about the children; she believed Monica was angry, disagreed with the court order and "she could not come herself to harass me so she sought out police officers, attorneys and others to do that on her behalf."

On December 14, Monica filed an ex parte request for a temporary emergency order, requesting sole physical and legal custody and a child custody evaluation with psychological testing for Claire, based on the same general allegations as her DVRO request. The next day, she filed a supplemental declaration stating she had learned on the afternoon of December 14 that the children were "found" at a preschool in San Ramon and she had no information as to their whereabouts or safety.<sup>3</sup> She also requested amended travel restrictions completely prohibiting Claire from taking the children out of

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<sup>3</sup> The request for order was supported by a number of character references and statements regarding Monica's care of the children and Claire's instability and conduct toward Monica and the children.

San Francisco County, stating that she had been advised by the State Department to request a more restrictive travel order prohibiting international travel.<sup>4</sup>

Opposing Monica's requests for a DVRO and for the emergency order, Claire stated that she never "abducted" the children but rather "escaped" Monica's domestic abuse, that the girls were in no danger, and that there was no basis for a psychological exam. She maintained that she, not Monica, was the children's primary caregiver and that Monica's various allegations of mental instability, drug and alcohol use, and specific conduct were false.<sup>5</sup> Claire sought sanctions against Monica and her counsel (Code Civ. Proc., § 128.5) for bad faith tactics and conduct including Monica's attorneys contacting Claire's attorney three times in less than three weeks regarding ex parte motions, the first two of which were then not filed, and demanding that the San Ramon police conduct welfare checks in order to harass Claire.

On December 18, the court filed an order denying the request for order pending a hearing. After a brief hearing on December 20, the court set a "trial long-cause" hearing for December 27 and 28, with the existing orders to remain in effect meanwhile.

Claire, Monica and Molly testified at the hearing on December 27 and 28. At the conclusion of the hearing, the court expressly found Monica credible and Claire not credible, explaining that there were "many points throughout the testimony that have

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<sup>4</sup> Monica described reasons to view Claire as a flight risk, including her comfort living abroad, having done so for many years, and knowledge gained from past employment as a visa officer for the State Department regarding ways to obtain passports and "find loopholes in restraints on travel."

<sup>5</sup> For example, with respect to the allegations of insurance fraud, Claire stated that a "routine audit" of her travel and insurance claims was conducted and closed with "no finding of wrongdoing." Claire expressly characterized as a lie Monica's statement in her declaration in support of her request for a DVRO that when working as a foreign service officer in South Africa in 2016, Claire had to be airlifted out because she was severely depressed and was required to do six weeks of intensive psychiatric treatment; Claire stated that the cause of her being "med-evaced" from South Africa was an adverse reaction to medication and the State Department never required her to undergo any kind of treatment. Claire also pointed to Monica having indicated in her request for child abduction prevention orders that Claire ended a lease when it was Monica who gave notice that they were moving out of their San Francisco home.

displayed a lack of candor.”<sup>6</sup> The court found that Claire’s leaving the family home with the children on December 1 was “extreme,” and that Monica did not act in bad faith in contacting the police, filing ex parte requests and trying to locate the children, but rather as a concerned parent.<sup>7</sup> The court identified three separate acts of abuse: Claire’s fraudulent use of Monica’s name, as to which the court stated that Monica’s allegations were not refuted; the incident of violence by Claire against Molly, which the court found was true and “happened in the presence or close proximity of the children and [Monica] herself”; and the move out of the family home, which the court found abusive in the context of the parties’ history.

The court awarded sole legal and physical custody of the children to Monica and ordered that the restraining order include the children. It adopted Monica’s proposal for Claire to have two-hour supervised visits with the girls twice a week, once during the week and once on the weekend, but ordered a review hearing in a month, with the goal of having as many visits as possible before the review and hope of being able to dispense with the supervision requirement.

On December 29, 2017, the court filed “Additional Findings After Hearing” which, after reiterating its oral finding that Monica was credible and Claire was not, stated the following findings: Claire’s allegations of domestic violence were without

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<sup>6</sup> The court pointed to Claire’s testimony that when she went out after the argument with Monica on the last night of the Thanksgiving vacation, it was to buy a diet Coke. Monica had testified that Claire went out that evening to get wine, which she drank after returning to the cabin, and Molly had also testified that Claire returned with a bottle of wine. The court found Claire’s testimony not credible and felt she was lying “unnecessarily” about something that otherwise would not have been a big deal, which led the court to doubt other parts of Claire’s testimony.

<sup>7</sup> The court observed that the DVRO procedure allows whichever person gets to court first to present one view without the court hearing from the other side, and that what Monica did after Claire obtained the temporary restraining order was to advocate for herself and insist the court listen to her version of the story. The court stated, “That is not domestic abuse. If anything that shows that she was concerned. And that she was concerned about [Claire’s] conduct and the implications, the negative implications that could flow to the children therefore.”

merit; Claire’s filing of her DVRO petition was pretextual, with the ulterior motive of gaining “a litigation advantage by setting herself up in a position to have sole custody of the children”; Claire’s “abrupt removal of the children and their belongings” was not done in genuine fear of Monica or her family but in bad faith and reckless disregard of the best interest of the children, was against the best interest of the children and designed to gain an unfair advantage in the impending family law litigation, and constituted “an independent act of domestic abuse towards [Monica], when viewed in connection with the history of prior abuse”; and Monica’s filing of emergency ex parte orders was reasonable and necessitated by Claire’s conduct “both before and after the issuance of court orders” in that Claire’s refusal to provide Monica with information about the children’s whereabouts and refusal to bring the children to their school was “reasonably concerning” to Monica and Monica’s “responsive actions, including enlisting police involvement for welfare checks, were reasonable under the circumstances created by [Claire’s] actions.”

On January 10, 2018, the court filed a restraining order against Claire for the protection of Monica and the girls, including stay-away and no-contact orders. Monica was given sole legal and physical custody of the children, with Claire to have professionally supervised visitation twice per week, plus Facetime visits every night she did not have a scheduled in-person visit.

## **DISCUSSION**

“A grant or denial of injunctive relief is generally reviewed for abuse of discretion. (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 849–850.) This standard applies to a grant or denial of a protective order under the DVPA. (See *Quintana v. Guijosa* (2003) 107 Cal.App.4th 1077, 1079.) [¶] ‘The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision

for that of the trial court.’ (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478–479.)” (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420.)<sup>8</sup>

## I.

Claire contends the trial court committed reversible error in failing to consider the parties’ written requests for DVROs, responses and supporting declarations at the hearing, and in failing to provide her an opportunity to be heard regarding Monica’s allegations of fraud.

Claire initially asserts that the trial court violated her constitutional right to procedural due process by failing to consider the parties’ DV-100 and DV-120 forms—the Judicial Council of California Forms for requesting a DVRO and responding to such a request - and accompanying declarations. The Judicial Council forms are required to be used in seeking protective orders and other relief under the Domestic Violence Protection Act (DVPA). (Fam. Code, § 6200 et seq.; *Moore v. Bedard* (2013) 213 Cal.App.4th 1206, 1210; San Francisco Superior Court Local Rules of Court,<sup>9</sup> rule 11.9(B).)

At the outset of the hearing, Claire’s attorney asked the court to strike “declarations” Monica had submitted from individuals who would not be testifying at the hearing because they were “not really true declarations,” apparently referring to the fact that Monica had submitted character references and other statements that were not formal

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<sup>8</sup> Claire’s brief requests a stay on appeal. Contrary to the directions in the rules of court that the cover of a document requesting a stay from a reviewing court must “[p]rominently display the notice ‘STAY REQUESTED’ ” and “[i]dentify the nature and date of the proceeding or act sought to be stayed” (Cal. Rules of Court, Rule 8.116), the cover of Claire’s brief gives no indication such relief was being sought. By the time the case was fully briefed (upon Monica’s failure to file a respondent’s brief), the DVRO had expired by its own terms, rendering the request for a stay moot.

Although the DVRO has expired, we exercise our discretion to reach the merits, rather than dismiss the appeal as moot, due to the potential consequences of a DVRO having been issued. (E.g. Fam. Code, § 3044 [rebuttable presumption that award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence within the previous five years is detrimental to the best interest of the child].)

<sup>9</sup> Further references to rules will be to the San Francisco Superior Court Local Rules unless otherwise noted.



declarations under penalty of perjury. The court explained that under the local court rules, in a long-cause hearing, declarations can be admitted as evidence only if the parties stipulate to present the testimony in this form (rule 11.13(C)(7)), which they did not do here. Accordingly, the court stated that the declarations would not be considered at the hearing: “I am not going to entertain a motion to strike them. They’re simply not in evidence. They’ve been filed. They’re filed. But they’re not considered for this hearing.”

The trial court’s statements specifically addressed the declarations of individuals other than the parties; the court did not indicate one way or the other whether the local rule also applied to the parties’ own declarations submitted in further explanation of the allegations contained in the DV-100s and DV-120s. But the court certainly never suggested it was not considering the parties’ DV-100s, DV-120s or other pleadings themselves. Accordingly, Claire’s argument that the court’s failure to consider these pleadings violated her constitutional rights is misplaced.

Assuming for the sake of argument that the court’s refusal to consider declarations applied to the declarations of the parties as well as the ones the court specifically addressed, it is difficult to comprehend Claire’s claim that her constitutional rights were violated. Claire and Monica both testified at the hearing and were able to address in their testimony any matter described in their declarations; both were cross examined by opposing counsel and questioned by the court. Claire does not suggest any specific evidence she was prevented from presenting due to the court’s refusal to consider the declarations. In short, the refusal to consider declarations the parties had not stipulated could be entered into evidence, in adherence to the local rule of court, did not deny Claire her opportunity to be heard. (*In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 290–292 [reversing judgment where court threatened mistrial if proceedings were not quick enough and abruptly ended trial before party finished presenting case, without opportunity for rebuttal or argument of counsel].)

Claire also contends the trial court deprived her of the opportunity to respond to Monica’s claim that Claire used Monica’s name in committing fraud. The allegation was

described in Monica's declarations as Claire using Monica's name in submitting false medical claims to her employer, the State Department. The issue was not addressed in Monica's testimony at the hearing until after both parties had presented their direct testimony and been cross-examined, and Monica had presented rebuttal testimony and been cross-examined. At this point, the court asked Monica what was abusive in Claire's conduct toward her aside from the abrupt move out of the family home with the girls. Monica listed a number of issues, including the use of her name on insurance documents and Claire being investigated for fraud. In response to the court's request for further description of the fraud, Monica said she became aware in August 2016 that she was being investigated for insurance fraud, and after she was interviewed by officers from the Office of the Inspector General it "became clear" that Claire had used her name on medical insurance forms seeking reimbursement. Monica said she was told Claire had created over 200 claims using Monica's name.

Claire's attorney, recognizing that Monica was responding to a question from the court, asked if he could make objections, and the court said both sides were entitled to make objections and would be given an opportunity for "follow-up" as well. Counsel objected that the court's question was "broad and opened up large issues and there was a lot in there that wasn't relevant," and asked for a specific focus on "what she has personal knowledge as to the claims contained in her DV-100 that forms the basis for today's action." The court found this an "appropriate objection." It then asked Monica what she knew about what happened next regarding the insurance fraud. Monica said she knew Claire was questioned and hired an attorney, and said she had spoken "the other day" with an individual she named to find out the status of the case and was told it was "ongoing," they were "getting ready to finalize it" and "there will be charges against Claire." Monica then stated that Claire also used Molly's name for fraudulent purposes, "to pretend that we had rented a place from my sister so that the State Department would refund that rent money to Claire."

After a few more questions from the court on other issues, the court asked Claire's counsel whether he had any follow up and counsel said he did not. Monica's attorney questioned her about the other issues the court had addressed.

The court then questioned Claire, asking whether her request for a DVRO was based on anything other than the incident at the family cabin, the wellness checks and Monica's litigation conduct; about some of her conduct with respect to the move out of the family home; and about allegations Claire made regarding an attorney for Monica improperly contacting Claire directly despite her being represented by counsel. The court did not ask Claire anything about Monica's fraud allegations, nor did either counsel in their follow up questions.

Claire contends she was deprived of an opportunity to present a defense regarding the fraud allegations because the court did not question her about this matter and, although counsel was permitted to question the witnesses following the court's questions, such questioning was cross-examination and therefore limited to the matters within the scope of the court's direct examination. This argument is based on Evidence Code sections 775 and 761. Evidence Code section 775 provides that the court may call witnesses and "interrogate them the same as if they had been produced by a party to the action" and such witnesses "may be cross-examined by all parties to the action in such order as the court directs." Evidence Code section 761 defines "cross-examination" as "the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness."

Claire's attorney made no attempt to bring Claire's perspective on the fraud allegations to the trial court's attention.<sup>10</sup> Nothing prevented counsel from questioning Monica about the issue following the court's questions and her testimony, yet counsel chose not to do so. Nor did counsel suggest any problem when the court did not ask

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<sup>10</sup> As indicated above, in her declaration opposing Monica's request for sole custody, supervised visitation and travel restrictions, Claire stated that there was a "routine audit" of her travel and insurance claims during her employment at the State Department that was "closed with no finding of wrongdoing."

Claire any questions about the fraud allegations or attempt to ask her any questions on the matter in his follow up to the court's questions, thereby depriving the court of the opportunity to allow such questioning had it been requested, despite any technical noncompliance with Evidence Code sections 755 and 761. Having thus failed to address the issue in the trial court, Claire may not seek reversal on this basis. "A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court." (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193; *In re Dakota H.* (2005) 132 Cal.App.4th 212, 221.)

In any event, this was only one of the instances of abuse upon which the court based its decision to grant Monica's request for a DVRO. Claire has not shown that the court would have reached a different decision even if the alleged fraud were excluded from consideration.

## II.

Claire next contends the trial court exceeded its discretion in granting the DVRO request based on the incident between her and Molly at the cabin and based on her moving out of the family home with the children. With respect to the former, Claire argues the evidence does not support the court's finding that an "incident of violence" occurred "in the presence or the close proximity of the children" and Monica. As to the latter, she argues the act does not come within the definition of abuse.

The DVPA defines "abuse" as "intentionally or recklessly causing or attempting to cause bodily injury, or sexual assault, or placing a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or engaging in any behavior that has been or could be enjoined pursuant to section 6320." (*Conness v. Satram* (2004) 122 Cal.App.4th 197, 201; Fam. Code, § 6203.) Section 6320 specifies a range of behavior including "disturbing the peace of the other party." "[D]isturbing the peace of the other party" means 'conduct that destroys the mental or emotional calm of the other party.' (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1497 . . . .)" (*Gou v. Xiao* (2014) 228 Cal.App.4th 812, 817.)

Claire recognizes that a DVRO may be issued to protect an individual who has not been personally abused but has witnessed child abuse. (*Gou v. Xiao, supra*, 228 Cal.App.4th at p. 818 [child abuse witnessed by mother could be found to have placed her in “reasonable apprehension of imminent serious bodily injury to herself or the child” and “disturbed [her] peace by causing the destruction of her mental or emotional calm”]; *Perez v. Torres-Hernandez* (2016) 1 Cal.App.5th 389, 401 [“abuse of their children destroyed Perez’s emotional clam and made her fear for her safety and the safety of her children”].) She argues that the situation here is different because incident involved Molly, not the parties’ children, and was not witnessed by Monica. She further maintains that because Monica did not witness the incident, she could not have been placed in reasonable apprehension of imminent bodily injury or had her mental and emotional calm disturbed.

First, it is not clear that Monica did not witness the incident between Claire and Molly. On the contrary, Molly’s testimony indicates the opposite. Molly testified that as she was “[i]n the process of handing [the child] to Monica,” Claire pushed her into the wall, she fell backwards and “then [the child] was able, I think at that point [the child] was with Monica heading upstairs.” She testified that she grabbed Claire’s arm as she was falling backward and Claire screamed, put her fist in Molly’s face and said she was going to call the police. Asked what happened next, Molly testified, “Then Claire and Monica and the girls went all the way upstairs to the bedroom.”

Claire emphasizes that neither she nor Monica described Monica witnessing the incident. Monica testified that on the morning of the incident Claire was in such a rage that Monica was afraid for her to be driving; while Monica was holding one crying child, Molly got the child who Claire had put into the car and “brought both babies to [Monica],” and Monica took them upstairs and tried to console them “while things continued downstairs.” Monica did not describe seeing anything happen between Claire and Molly or feeling any fear due to their interaction. Claire testified that Molly blocked her from going upstairs, grabbing her arm so hard that she left a large bruise, and did not indicate where Monica or the children were as this happened.

Claire points out that Molly's testimony is inconsistent with Monica's statement that she was upstairs with the children while everyone else, including Claire, continued arguing downstairs. But Monica was not asked about any interaction between Molly and Claire; she had been asked generally about arguments that weekend and described Claire trying to leave with the children in a rage and Molly getting the child from the car and giving her to Monica. Her testimony was not inconsistent with having received the child from Molly's arms as Molly was pushed and immediately taking the girls upstairs as the rest of the interaction between Claire and Molly played out. And while there may be an inconsistency between Molly's testimony that "Claire and Monica and the girls went all the way upstairs" after the incident and Monica's testimony that she was comforting the girls upstairs before Claire "eventually" came up, the inconsistency at most goes to whether the incident occurred in the "presence" of the girls and Monica; the testimony at a minimum supports the finding that the incident occurred "in close proximity" to them.

In any event, such discrepancies do not undermine the court's factual finding. Clearly, the court believed Molly's version of the events over Claire's, notwithstanding the fact that the court did not expressly make a credibility finding regarding Molly as it did regarding Monica and Claire. It is apparent that the incident occurred quickly, and that the ability of any of these witnesses to remember precise details would have been affected by the stressful and emotional circumstances. Without question the incident supports a conclusion that Claire's conduct toward Molly disturbed Monica's peace by destroying her "mental or emotional calm." (*Gou v. Xiao, supra*, 228 Cal.App.4th at p. 817.) The incident, as described by Molly, also posed a direct threat of injury to the child who was in Monica's arms as Claire knocked Molly into the wall.

Claire's challenge to the court's finding that her moving out of the house constituted an act of abuse is no more persuasive. In Claire's view, the trial court "extended the definition of 'abuse' to include the act of moving out of the marital home with one's children without notice to the other parent." Claire ignores the court's explanation of this finding. The court expressly concluded that "[w]ithout the context that existed before the parties got to that point, the weekend of December 3rd, that may

not have been abusive. In this case it was abusive because of the context and history between the parties.” The court stated, “When we take the incident of violence which I find to be true by [Claire] against [Molly], which happened in the presence or close proximity of the children and [Monica] herself, and we take the prior history of this fraudulent conduct that negatively affected [Monica], and we take the history of [Claire] communicating her own thoughts of lack of stability or impulse control when it comes to shopping, as one of the emails that was introduced into evidence displayed, all of those things make it extremely reasonable for [Monica] to have grave concerns when she comes home and finds out that her children have been taken from their home without any notice, without any indication as to where they are, and everything that flowed from that point forward was very traumatic. And in the context of this case was a separate act of abuse.” The grave concern demonstrated by Monica’s attempts to locate the children and have the police check on their welfare, which the trial court found reasonable under the circumstances, attest to the degree to which her mental and emotional calm was disturbed by Claire taking advantage of Monica’s weekend absence to move the children and their belongings out of the family home and attempt to hide their location from Monica.<sup>11</sup> The trial court did not abuse its discretion in finding Claire’s conduct constituted abuse within the meaning of the DVPA.

### III.

Claire next contends the trial court erred in admitting evidence of her privileged and protected medical information. A patient has a statutory privilege to refuse to

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<sup>11</sup> Claire asserts that finding her move out of the family home to be an act of abuse “dangerously contravenes the purpose of the DVPA” and “subjects victims of domestic violence abuse to continued abuse and prevents them from seeking a period of separation.” But the trial court did not accept her claim that she was a victim of domestic violence perpetrated by Monica; it found Claire was not credible, her allegations against Monica were without merit, and her filing of her request for a DVRO was “pretextual,” done for the ulterior motive of gaining a litigation advantage in the parties’ custody dispute. Nothing in the trial court’s decision or ours suggests that a victim of domestic violence who moves out of the family home without notice in order to escape such abuse should be viewed as having committed an act of abuse by doing so.

disclose, and prevent another from disclosing, a confidential communication between the patient and his or her physician or psychotherapist. (Evid. Code, §§ 994, 1014.) Such “confidential communication” “includes a diagnosis made” by the physician or psychotherapist.” (Evid. Code, §§ 992, 1012.) The privilege may be waived where the patient puts his or her condition at issue in litigation (Evid. Code, §§ 996, 1016), but Claire maintains she did not do so here.

Claire raises two specific points. The first is that Monica “used Claire’s bipolar disorder diagnosis and a belief that it is linked to impulsive buying habits arguing that this is directly related to an allegation Claire had regarding financial control Monica had over Claire during the marriage.” Claire’s attorney objected when Monica described an email from Claire as “discussing her spending issues as a classic symptom of bipolar disease.” The trial court initially sustained the objection, then reversed itself upon clarification that Monica was not testifying that she believed Claire suffered from bipolar disorder but rather describing Claire’s own words, which the court found relevant to Claire’s claim that Monica exercised financial control over her.

Second, Claire points to Monica’s testimony concerning medications Claire takes. In responding to questions from the court about her allegations that Claire would drink and drive, Monica referred to Claire “taking a lot of medications” that Monica understood should not be mixed with alcohol. Claire’s attorney objected on grounds of foundation and personal knowledge, and the court sustained the objection “subject to follow-up by both parties.” Monica’s attorney then asked her about Claire’s medications and Monica’s testified that one, the name of which she could not recall, was “the most common medication for someone who is bipolar.” Claire’s attorney objected that Monica had no personal knowledge and was not an expert, and that Claire’s mental health was not at issue, stating, “They haven’t provided any expert testimony as to why this court should treat people with an illness differently in terms of parentage.” Reiterating a distinction it had made earlier, the court responded that “we would never treat someone with any type of illness any differently” but the line of questioning was relevant because medication combined with alcohol could create a danger for children “who might be in the car or



around someone who is combining medication with alcohol.”<sup>12</sup> The court struck Monica’s testimony about “the most common medication” for bipolar disorder because there was no foundation as to Monica’s knowledge on the issue, noting that it did not know the name of the medication and whether it would have any side effects when combined with alcohol. Monica’s attorney then proceeded to refresh the witness’s recollection as to the names of several medications by showing her an email to her from Claire.

We do not find it necessary to decide whether the trial court was correct in its view that Monica could relate in court Claire’s communications to her regarding Claire’s diagnosis and medications.<sup>13</sup> The court did not rely upon either in concluding that Monica had demonstrated domestic abuse supporting issuance of the DVRO—despite the court’s obvious concern with the allegations that Claire’s use of alcohol in combination with medication posed a risk to the children. As we have said, the court found three acts of abuse: The fraudulent use of Monica’s name; the act of violence against Molly in the presence of or close proximity to Monica and the children; and the “extreme” act of “abrupt[ly]” moving out of the house with the children, which the court found to have

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<sup>12</sup> Previously, in connection with Claire’s motion to exclude references to mental health issues, the court had stated that while a mental health issue “is not in and of itself grounds for the court to issue a domestic violence restraining order,” “certain life circumstances, whatever they may be, can be highly relevant for other reasons.” Monica’s attorney had represented that Monica did not intend to produce medical records or have experts testify to privileged records or communications with physicians, only to disclose her own communications with Claire and observations, which counsel argued were relevant to Monica’s state of mind. Counsel maintained that with regard to allegations such as Monica financially controlling Claire, Monica’s conduct could not be understood without the context of communications in which Claire told Monica that she had a mental health issue that caused her to overspend and needed help with this problem.

<sup>13</sup> Claire’s argument that her diagnosis and medications were not relevant to any issue in the case is unconvincing. While she did not bring up her allegations that Monica exercised financial control over her during the two-day hearing, those allegations were in her pleadings and Monica’s response rested on the email in which Claire identified difficulty controlling spending as a symptom of her illness. And the court’s concern with Claire’s alleged use of medications in combination with alcohol was plainly relevant to Monica’s allegations that Claire’s conduct endangered the children.

been done in bad faith, in reckless disregard of the best interest of the children, against the best interest of the children, and for the purpose of gaining an “unfair advantage in the impending family law litigation.” In light of the court’s express finding that Claire lacked credibility, rejection of Claire’s claims against Monica, and view of Claire as acting in bad faith and in order to gain an advantage in further litigation, it is all but impossible to believe the outcome of this proceeding would have been different if the court had refused to allow Monica to refer to Claire’s diagnosis and medications.

#### **IV.**

Claire’s final contention is that the trial court erred in finding that Monica did not commit perjury.

One of the sections on the form DV-100, request for a DVRO, asks, “Are there any restraining/protective orders currently in place OR that have expired in the last six months (emergency protective orders, criminal, juvenile, family)?” Following this question are boxes to check “no” or “yes,” with spaces to fill in the date of the order and date of expiration. On the form Monica filed, the “yes” box was checked, with December 4, 2017, written for “date of order” and December 20, 2017, written for “expiration date.”

At the hearing on December 20, prior to the two-day long cause hearing, the judge referred to Monica’s request for a DVRO having “a box checked yes that there was a criminal protective order in place” and asked counsel if this was correct. Monica’s attorney said there was no criminal protective order; she believed there was “a criminal background of [Claire],” and said the box was checked because of the family court restraining order issued on December 4—that is, the initial TRO Claire obtained against Monica. Subsequently, Claire’s attorney asked Monica on cross examination about checking the box indicating there was “a criminal restraining order in effect” against Claire. Monica replied, “I’m sorry. I think my previous attorney did that. I didn’t know anything about it until you all brought it up.” When Claire testified, her attorney elicited her testimony that she had seen the representation that there was a “criminal protective order in effect against you,” that to her knowledge there was not a criminal protective order against her, and that when the court asked Monica’s attorney about this, the

attorney said the box had been checked because they believed Claire had a criminal background.

Subsequently, in response to Claire’s argument that checking the box “yes” constituted perjury, the court stated, “Checking a box that there’s a criminal restraining order in place without anything more stated, I don’t find that to be perjurious. I find it to be inaccurate. And there’s no attending comments or commentary associated with that. I don’t believe that was designed in any way to actually mislead the court and the testimony I believe speaks for itself given the fact that I believe [Monica] herself is credible.”<sup>14</sup>

We do not comprehend how this became an issue. The “yes” box on the DV-100 form refers to “any restraining order,” further defined by the parenthetical “(emergency protective orders, criminal, juvenile, family).” Checking this box does not necessarily represent that there was a *criminal* restraining order, only that there was *some* type of restraining order. “Family” is one of the listed options, and the dates filled in on the form clarify that the reference was to the TRO Claire obtained against Monica. There was no false statement.

## **DISPOSITION**

The order is affirmed.

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<sup>14</sup> Claire also views as perjury that Monica’s request for a no-travel order checked a box for “ended a lease” in a section asking what things the person sought to be restrained has done recently “that make it easy for him or her to take the children away without permission.” Monica acknowledged at the hearing that she wrote the email to the parties’ landlord stating their intention to end their lease, and the trial court did not comment upon Claire’s reference to the lease as an instance of perjury. The issue requires no further discussion here because, although appellant mentions the lease as a second example of alleged perjury, her actual argument is addressed entirely to the representation regarding the protective order.

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Kline, P.J.

We concur:

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Richman, J.

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Miller, J.

*Smith v. Smith* (A153691)